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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1271

DELLA DAVIS, THEODORE MARKOWITZ, and JACK GULLO,

Petitioners,

—against—

THE NEWS, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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—against—

THE NEWS, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Della Davis, Theodore Markowitz and Jack Gullo, hereby petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit dismissing an appeal for lack of jurisdiction, from an order denying petitioners' motion for

summary judgment, which had sought injunctive relief in an anti-trust case, though the uncontroverted facts showed a *per se* violation of the anti-trust laws.

Opinions Below

The United States Court of Appeals for the Second Circuit did not deliver any opinion. A copy of its order is annexed hereto as Appendix A. The opinion of the United States District Court for the Southern District of New York is not yet reported; it is appended hereto as Appendix B.

Jurisdiction

The order sought to be reviewed was made and entered on October 26, 1970. The statutory provision believed to confer on this Court jurisdiction to review the order in question by writ of certiorari is 28 U.S.C. §1254(1).

Question Presented for Review

1. Did the Court of Appeals err in dismissing the appeal, for lack of jurisdiction, from the denial of petitioners' motion for summary judgment in an anti-trust action, seeking injunctive relief, where the following uncontroverted facts were shown:

Petitioners, independent routedealers who home delivered all newspapers, were advised by The New York News that unless they discontinued the sale of all other newspapers and sold The News and The News alone, at a maximum price fixed by The News, they would be cut off from all supplies of copies of The News. The petitioners not accepting, The News cut off supplies of copies of the newspaper to petitioners, and entered into agreements with so-called franchised distributors, who did home deliver The News at the maximum resale price set by The News, and solicited away customers of the petitioners.

Statute Involved

Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. §1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal * * *."

Statement of the Case

Petitioners Davis, Markowitz and Gullo, along with others, began an anti-trust action against The News, certain officers thereof, and so-called franchise distributors of The News, in the United States District Court for the Southern District of New York, jurisdiction resting upon 38 Stat. 731, 15 U.S.C. §15, and 62 Stat. 931, 28 U.S.C. §1337, setting forth alleged violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §1, 2), Section 3 of the Clayton Act (15 U.S.C. §14), and Section 1 of the Robinson-Patman Amendment to the Clayton Act (15 U.S.C. §13, now §2 of said Clayton Act.)

In reliance upon the intervening decision of this Court in *Albrecht* v. *Herald Co.*, 390 U.S. 145, and in an effort to avoid a lengthy and complicated trial, three of the plaintiffs—your petitioners—moved for summary judgment, seeking, *inter alia*, injunctive relief. Their moving affidavits showed, without dispute, that they were or had been independent routedealers who home delivered all newspapers in the New York City metropolitan area, delivering in areas whose boundaries were recognized by The News, and to whom The News had supplied copies of its newspaper. They further showed that they had been advised by The News that unless they discontinued sales of all other newspapers, unless they sold The News and The News only, at a maximum price fixed by it, their supplies of copies of the newspaper would be cut off.

The three moving plaintiffs did not go along with the urgings of The News. The News thereupon terminated all deliveries of copies of the newspapers to the three moving plaintiffs, entering into written contracts with other persons, known as franchise distributors, who did home deliver The News (and The News alone) thereafter, pursuant to written agreements with The News, at the maximum price set by The News, the customers of plaintiffs being solicited away to the new franchise dealers by The News and by such dealers.

The motion for summary judgment was denied in the District Court (per Motley, J.), on the ground that there were triable issues of fact, the District Court opinion reciting that the issues were: "Whether The News made a 'wholly unilateral' decision to refuse to sell newspapers to plaintiffs, 390 U.S. at 149", and "Whether The News tried to 'force [plaintiffs] to maintain a specified price for the resale' of The News, 390 U.S. at 153". (App. B, *infra*, p. 5a).

No such issues had been raised in the summary judgment motion papers.

Petitioners appealed to the United States Court of Appeals for the Second Circuit. Defendants moved to dismiss the appeal, and the motion was granted "for lack of jurisdiction". (App. A, *infra*, p. 1a). This petition is to review the order granting the motion to dismiss.

REASONS FOR GRANTING THE WRIT

I. In dismissing an appeal from an order denying summary judgment wherein injunctive relief had been sought, where denial of summary judgment had rested on the purported existence of triable issues of fact, but where such issues had never been raised, did not exist, and would have been irrelevant if existent, the court below decided an important question of federal law which has not been, but should be, settled by this Court.

In *Goldstein* v. *Cox*, 396 U.S. 471, 475, n. 2, this Court noted the following:

> "In *Switzerland Assn., supra*, this Court left open the question whether an order denying summary judgment might be appealable as an order denying an injunction when the ground for the denial was other than the existence of a triable issue of fact".

In the case at bar, where injunctive relief had been sought, the *purported* ground for the denial of summary judgment was the existence of triable issues of fact. But the issues of fact which were found present by the District Court were actually not present in the case at bar, and were nowheres raised in the motion papers; their supposed existence was based wholly and entirely upon a misreading of this Court's opinion in *Albrecht* v. *Herald Co.*, 390 U.S. 145. In *Albrecht*, as here, a newspaper publisher fixed a maximum resale price of the paper, cut off supplies to a retailer who refused to abide by the maximum resale price, and entered into agreements with other persons who supplanted the non-complying dealer, with his business being solicited away. This, it was ruled, was a *per se* violation of the anti-trust laws. The facts in

Albrecht are thus virtually identical to the undenied facts in the case at bar.

But the District Court here saw an issue of fact as to "Whether The News made a 'wholly unilateral' decision to refuse to sell newspapers to plaintiffs, 390 U.S. at 149'", (App. B, *infra*, p. 5a). However, the page of the *Albrecht* opinion thus cited by the District Court merely showed the facts existing in *Albrecht*, under which this Court held that the publisher's conduct was clearly not wholly unilateral—and the same facts are present here. For here, as indicated in the language of this Court at 390 U.S. 149, and as in *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, there was more than a mere announcement of policy and simple refusal to deal. For the convenience of the Court, we have reprinted in the margin below the language of *Albrecht*, extracted from in the District Court's opinion, as well as the next succeeding page thereof.[1]

---

[1] "On the undisputed facts recited by the Court of Appeals respondent's conduct cannot be deemed wholly unilateral and beyond the reach of § 1 of the Sherman Act. That section covers combinations in addition to contracts and conspiracies, express or implied. The Court made this quite clear in *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960), where it held that an illegal combination to fix prices results if a seller suggests resale prices and secures compliance by means in addition to the 'mere announcement of his policy and the simple refusal to deal . . .' *Id.*, at 44. Parke Davis had specified resale prices for both wholesalers and retailers and had required wholesalers to refuse to deal with non-complying retailers. It was found to have created a combination 'with the retailers and the wholesalers to maintain retail prices . . .' *Id.*, at 45. The combination with retailers arose because their acquiescence in the suggested prices was secured by threats of termination; the combination with wholesalers arose because they cooperated in terminating price-cutting retailers.

(*Footnote continued on following page*)

In *Albrecht*, as here, the newspaper established maximum prices to be charged by routedealers who enjoyed exclusive territories, and the newspapers did more than to simply engage in competition with the retailer. There, as here, the publisher engaged in contractual relations with other persons, the franchise dealers, to solicit away business of the plaintiffs. There was thus a combination within the meaning of Section 1 of the Sherman Act as held in *Albrecht* and *Parke, Davis*, and there was no issue of fact. And a "contract" in restraint of trade is as illegal under Section 1 as is a combination—but there was no denial of existence of contracts between The News and the franchise dealers; on the contrary, a specimen copy of such a contract was annexed to the moving papers.

(*Footnote continued from preceding page*)

"If a combination arose when Parke Davis threatened its wholesalers with termination unless they put pressure on their retail customers, then there can be no doubt that a combination arose between respondent, Milne, and Kroner to force petitioner to conform to the advertised retail price. When respondent learned that petitioner was overcharging, it hired Milne to solicit customers away from petitioner in order to get petitioner to reduce his price. It was through the efforts of Milne, as well as because of respondent's letter to petitioner's customers, that about 300 customers were obtained for Kroner. Milne's purpose was undoubtedly to earn its fee, but it was aware that the aim of the solicitation campaign was to force petitioner to lower his price. Kroner knew that respondent was giving him the customer list as part of a program to get petitioner to conform to the advertised price, and he knew that he might have to return the customers if petitioner ultimately complied with respondent's demands. He undertook to deliver papers at the suggested price and materially aided in the accomplishment of respondent's plan. Given the uncontradicted facts recited by the Court of Appeals, there was a combination within the meaning of § 1 between respondent, Milne, and Kroner, and the Court of Appeals erred in holding to the contrary."

The other issue of fact which the District Court found to exist was 'Whether The News tried to 'force [plaintiffs] to maintain a specified price for the resale' of The News, 390 U.S. at 153." (See App. B, p. 5a, *infra*). Again, we note at the outset that defendants nowhere denied that The News had tried to force plaintiffs to maintain a specified maximum resale price. The language quoted by the District Court was taken from the following sentence in *Albrecht*, 390 U. S. at 153:

> "It is our view, therefore, that the combination formed by the respondent in this case to force petitioner to maintain a specified price for the resale of the newspapers which he had purchased from respondent constituted, without more, an illegal restraint of trade under §1 of the Sherman Act."

Since the combination here is precisely and undeniably the same type of combination as existed in *Albrecht*, it is clear that there is no issue as to whether The News tried to force plaintiffs to maintain a specified maximum resale price, for the operative facts here (cut-off upon refusal and solicitation of customers) are virtually indistinguishable from those in *Albrecht*.

The admitted facts here and in *Albrecht* are virtually identical. The News never denied that when a plaintiff would not comply with its edict to distribute The News and The News alone at a maximum price prescribed by it, The News would no longer deal with such plaintiff, and would engage in combination with franchise dealers to draw away the customers of the plaintiff. There was nothing more than this, in *Albrecht*. Not only does no issue of fact exist, but any issue of fact beyond the conceded facts would be irrelevant.

We thus have the situation where injunctive relief is denied initially on the basis of purported but non-existent issues of fact, which, if they did exist, would be irrelevant, in the light of the admitted facts and circumstances, and which were never raised by any party in the District Court. This Court has never passed upon the question of whether such an order is appealable. We submit that this question is important enough to be passed upon by this Court, for otherwise the recital by a district judge that an issue of fact exists will be enough to defeat an appeal in a case where injunctive relief is sought, even when the issue does not exist, or if the issue found to exist is irrelevant in the light of law and the other undenied facts.

Surely, our federal appellate courts are already overburdened, as are our federal district courts. But summary judgment is a tool for cutting through calendar congestion; the net savings of judicial time by reversal here would, in the final analysis, result in a tremendous saving of judicial time.

II. The questions presented below having been fundamental to the further conduct of this case, the District Court decision was appealable as a final judgment. In ruling that it lacked jurisdiction to entertain the appeal, the Court of Appeals thus decided a federal question in a way in conflict with applicable decisions of this Court.

Though the rule of this Court many years ago was that a final decision is "one which ends the litigation and leaves nothing for the court to do but execute the judgment" (*Catlin* v. *United States*, 324 U. S. 229, 233), this Court more recently ruled in *Gillespie* v. *United States Steel Corp.*, 379 U. S. 148, that a final decision "does not necessarily mean the last order possible to be made in a case. The require-

ment 'is to be given a practical rather than a technical construction'". In determining what is a final decision, this Court ruled,

> "• • • the most important considerations are 'the inconvenience and cost of piecemeal review on the one hand and the danger of denying justice by delay on the other.'"

This Court then ruled that a decision is final if the questions presented thereby are "fundamental to the further conduct of the case."

Though the Court below handed down no written opinion, one of the judges sitting remarked in oral argument that to entertain the appeal would be an extension of the rule of *Gillespie* which the Court of Appeals should not make. If he was correct, then, we submit, the Court of Appeals, by holding that it lacked jurisdiction to entertain the appeal, decided an important question of federal law which has not been, but should be, settled by this Court. However, we believe that it is not an extension of *Gillespie* to hold that a decision fundamental to the further conduct of this case, which if decided by reversal would obviate the need for an anti-trust trial, is within the rule of *Gillespie*, and that therefore the court below decided a federal question not only in a way in conflict with *Gillespie*, but in actual conflict with it.

Applying the considerations listed in *Gillespie*, then, we note first that there is neither inconvenience nor cost of piecemeal review at this juncture. For if the Court decides the very fundamental question of whether The News' conduct described above violates the anti-trust laws in favor of petitioners, the trial court and the parties will

be saved the inconvenience and cost of a lengthy anti-trust trial.[2]

As to the danger of denying justice by delay, we note that since the commencement of this litigation, several plaintiffs have already been forced out of business, and undoubtedly many more would be forced out of business before a trial could be had. Additionally, The News has now expanded its franchise home delivery program to the point where it has hundreds of franchise dealers in operation. The longer the case continues, the more franchise dealers there will be, and the greater the ramifications of any finding of illegality.

Moreover, pretrial proceedings have been continuing, pursuant to the calendar review rule of the District Court, and the case will shortly be noticed for trial.[3] Thus, consideration of the summary judgment motion on appeal will not delay any trial, but may result in speedier justice being granted by avoidance of trial.

Additionally, there may be confusion at the trial if the decision of the District Court denying summary judgment is to be considered the law of the case; a trial court might find, under such circumstances, that plaintiffs needed to prove something more than was proven by the uncontroverted allegations of plaintiffs' affidavits on the summary judgment motion, which might result in a verdict against plaintiffs, a subsequent appeal, and a new lengthy trial.

---

[2] Plaintiff's answers to defendants' interrogatories, alone, run some 1200 pages. A trial would undoubtedly last for weeks, if not many months.

[3] Despite the pendency of appeals, Chief Judge Sugarman of the Southern District entered an order requiring plaintiffs to complete pretrial procedure and file a notice of [redacted] on or before January 14, 1971. A motion is presently pending to extend that time for 90 days further.

We submit, accordingly, that the Court of Appeals below had jurisdiction to entertain the appeal under the rule of *Gillespie*.

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

Herbert Monte Levy,
Attorney for Petitioners,
295 Madison Avenue,
New York, N. Y. 10017.

APPENDIX A

Order on Motion to Dismiss Appeal

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of October, one thousand nine hundred and seventy.

CHARLES W. BOWEN, JR., *et al.*,

Plaintiffs-Appellees,

v.

THE NEWS, *et al.*,

Defendants,

DELLA DAVIS, THEODORE MARKOWITZ, JACK GUILD,

Plaintiffs-Appellants.

It is hereby ordered that the motion made herein by counsel for the appellees by notice of motion dated September 25, 1970 to dismiss the appeal from the United States District Court for the Southern District of New York for lack of jurisdiction be and it hereby is granted.

A. DANIEL FUSARO
Clerk

• • •

BEFORE: HON. LEONARD P. MOORE
HON. HENRY J. FRIENDLY
HON. ARLIN M. ADAMS
Circuit Judges

APPENDIX B

Opinion of the United States District Court

(Filed—July 16, 1970.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES W. BOWEN, JR., RICHARD CARTABUKE, JOSEPH DITTA and J. FAILLA, DELLA DAVIS, *et al.*,

Plaintiffs,

—against—

THE NEWS, DAILY NEWS, SUNDAY NEWS, NEW YORK NEWS, SYNDICATE CO., INC., *et al.*,

Defendants.

Appearances:

HERBERT MONTE LEVY
295 Madison Avenue
New York, New York 10017
Attorney for Plaintiffs
(Markowitz, Gullo and Davis)

TOWNLEY, UPDIKE, CARTER & RODGERS
By Andrew L. Hughes and L. Kevin Sheridan
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CONSTANCE BAKER MOTLEY, D. J.

Appendix B

Memorandum Opinion and Order on Motion for Summary Judgment and Motion to Dismiss

Plaintiffs, independent route dealers who deliver a variety of newspapers to homes primarily in Nassau and Suffolk Counties, bring this private anti-trust action against The News, its agents and employees and certain franchised dealers of The News. The complaint alleges violations of several provisions of the Sherman and Clayton Acts—15 U.S.C. §§ 1, 2, 13, and 14—and seeks treble damages and injunctive relief.

At issue, basically, is the effort of The News to change its home delivery service from that of distributors such as plaintiffs (who deal in a number of competing newspapers) to one of exclusive, or "franchised," dealers in The News. The most important of plaintiffs' allegations is contained in this passage from their Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment at 2:

> In or about the year 1966, the News, dominant in its field in the metropolitan area, advised plaintiffs that unless they became franchised dealers of The News—distributing the News only, to the exclusion of all other publications, on terms that The News dictated, The News would cut them off completely from obtaining copies of its newspaper. Moreover, The News decreed that as exclusive franchised operators, dealers would be directed to charge a maximum resale price to home subscribers for their copies of The News which was considerably less than the price which plaintiffs had then been charging for home delivery of The News, and which was a price at which plaintiffs could not profitably operate.

Appendix B

The following facts appear at p. 3-4 of Plaintiffs' Memorandum:

> The refusal of The News to deal with plaintiffs Markowitz, Gullo and Davis produced seriously injurious effects on their respective businesses. Even when each had obtained an alternative source for the newspaper, that source itself was threatened to be cut off unless it thereafter refused to sell to them. Plaintiff Markowitz was particularly harassed and intimidated by repeated acts of assault and trespass, and, on one occasion, was even falsely arrested on a trumped-up charge of stealing his own newspapers. Plaintiff Davis was required to travel more than fifty miles in order to obtain copies of The News in order to service customers. Plaintiff Gullo began to sustain precipitous losses, and was thus forced to sell his route. The franchised dealers contributed to the conspiracy and cutthroat competition by participating in acts calculated to destroy plaintiffs' businesses: the thefts and destruction of newspapers in their various territories was endemic.

The News obviously denied these latter allegations. (Affidavit of Jack E. Underwood, para. 27).

While there are several other questions presented in this action, three plaintiffs have moved for summary judgment only on the claim involving the question whether The News is guilty of impermissible price-fixing, as delineated in *Albrecht* v. *Herald Co.*, 390 U. S. 145 (1968). Defendants have moved for summary judgment against eight plaintiffs and have moved to dismiss the complaint as to five others.

On a motion for summmary judgment, the moving party has "the burden of showing the *absence* of a genuine issue

as to any material fact." *Adickes* v. *S. H. Kress and Company*, U. S. , 38 U.S.L.W. 4434 (June 1, 1970). (Emphasis Added). The record before the court as to each moving party does not show the required absence of a genuine issue as to any material fact.

Plaintiffs rely on *Albrecht* v. *Herald Co., supra*, in which the Court ruled that a *combination* formed by a newspaper company to force a newspaper distributor to

> maintain a specied price for the resale of the newspapers which [the distributor] had purchased from [the company] constituted, without more, an illegal restraint of trade under § 1 of the Sherman Act.

390 U. S. at 153. With respect to plaintiffs' motion, the following material facts, among others, remain in issue:

A) Whether The News made a "wholly unilateral" decision to refuse to sell newspapers to plaintiffs, 390 U. S. at 149;

B) Whether The News tried to "force [plaintiffs] to maintain a specified price for the resale" of The News, 390 U.S. at 153.

With respect to defendants' motion for summary judgment, there has been no showing that there are no genuine issues as to the material facts of plaintiffs' allegations of possible future injury to dealers in New Jersey and Westchester County. Both sides having failed to carry their burdens on their respective motions for summary judgment, the same are hereby denied.

Defendants' motion to dismiss the complaint as to five of the plaintiffs for failure to answer interrogatories is granted as to plaintiffs Falconer, Borders d/b/a White

Appendix B

Plains News Service, Beal, and Goldstein d/b/a Mel's News Service in accordance with the court's ruling from the bench when these motions came on for hearing. The motion to dismiss the complaint is denied as to plaintiff Robert C. Harding. It is clear that he did not intend to jeopardize his own cause of action by having plaintiff Donald F. Harding answer defendants' interrogatories for *both* of them. Equally apparent is the validity of Donald F. Harding's assignment of his cause of action to Robert C. Harding, which assignment cannot logically be affected by Donald F. Harding's *subsequent* discontinuance of his cause of action as explained by plaintiffs' counsel.

However, in order that the record may be clear, plaintiff Robert C. Harding is hereby directed to file an affidavit, within ten days of notice of entry of this order:

1. Stating that the answers to the interrogatories filed by Donald F. Harding are complete as to Robert C. Harding; or
2. Amending such answer to accurately reflect the facts if the answers are *not* complete as to Robert C. Harding, whichever the case may be.

Dated: New York, New York
July 15, 1970

So Ordered

s/ Constance Baker Motley
Constance Baker Motley
U. S. D. J.

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On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

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Supreme Court of the United States

OCTOBER TERM, 1970

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—against—

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The order of the Court of Appeals (Pet. App. 1a) and the opinion of the District Court (Pet. App. 2a-6a) are unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on October 26, 1970. The petition for writ of certiorari was filed on January 25, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether the Court of Appeals properly dismissed petitioners' appeal for lack of jurisdiction from the District Court's denial of summary judgment on the ground that material facts remained in issue.

Statement

By way of summary, petitioners are but three of more than fifty plaintiffs who commenced this antitrust action in March 1967, alleging violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2), Section 3 of the Clayton Act (15 U.S.C. §14), and Section 1 of the Robinson-Patman Amendment to the Clayton Act (15 U.S.C. §13), based on The News' efforts to institute a suburban home delivery franchise system. The complaint seeks relief in the form of treble damages and preliminary and permanent injunctions, although petitioners have never moved for injunctive relief.

On May 12, 1970, petitioners moved for summary judgment in the United States District Court for the Southern District of New York relying primarily upon the decision of this Court in *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968). The motion was denied on the ground that petitioners had failed to "show the required absence of a genuine issue as to any material fact" (Pet. App. 5a).

On October 26, 1970, the Court of Appeals dismissed, without opinion, petitioners' appeal from the District Court's decision for lack of jurisdiction.

The facts alleged to be "uncontroverted" in petitioners' statement of "Questions Presented for Review" are disputed and were disputed in the District Court. Specifically, The News denied that it ever fixed or sought to fix the resale price at which petitioners resold its newspapers. After sales to petitioners were discontinued as a result of a unilateral decision by The News, fair trade agreements authorized by New York State law were entered into by The News with franchise dealers providing for resale at a stipulated price.

Argument

The District Court denied petitioners' motion for summary judgment on the ground that:

> [T]he following material facts, among others, remain in issue:
>
> A) Whether The News made a "wholly unilateral" decision to refuse to sell newspapers to plaintiffs . . . ;
>
> B) Whether The News tried to "force [plaintiffs] to maintain a specified price for resale" of The News . . . (Pet. App. 5a).

Petitioners' assertion that these two issues are not material is untenable, for in *Albrecht* v. *Herald Co., supra*, 390 U.S. at 149 and 153, on which petitioners rely, this Court expressly held that the issues referred to by the District Court were material with regard to the ultimate issue of whether or not the newspaper company there was guilty of illegal price-fixing, the very claim on which petitioners here sought summary judgment.

Furthermore, the facts established in *Albrecht* after a trial are significantly different from even the disputed factual assertions raised by affidavits here. Two significant differences are: (1) In *Albrecht*, the newspaper was found to have conspired with others to force the plaintiff to resell at a fixed maximum price, whereas here, the alleged unlawful agreements were not with petitioners but with dealers who had replaced them as a result of The News' unilateral decision to change its system of home delivery distribution; (2) In *Albrecht*, there was no reliance by defendant, as there is here, upon a state fair trade law under which the agreements to maintain a stipulated price are exempted from the prohibitions of the Sherman Act by the McGuire Act (15 U.S.C. §45).

Petitioners claim that the Second Circuit's dismissal of the appeal for lack of jurisdiction was improper. But their assertion is utterly without merit for it is settled law that a court of appeals does not have jurisdiction to hear the appeal from a denial of summary judgment based on the existence of material issues of fact.

As this Court recently reiterated in *Goldstein* v. *Cox*, 396 U.S. 471, 475 (1970):

> In construing the . . . provision giving the courts of appeals jurisdiction to hear appeals from interlocutory orders granting or denying injunctions, 28 U.S.C. §1292(a)(1), this Court has ruled that a denial of summary judgment is not an appealable order denying an injunction, at least where the denial is based upon the existence of a triable issue of fact. *Switzerland Assn.* v. *Horne's Market*, 385 U.S. 23 (1966).

See also *Chappell* v. *Frankel*, 367 F.2d 197, 199-200 (2d Cir. 1966) and *Morgenstern Chemical Co.* v. *Schering Corp.*, 181 F.2d 160 (3d Cir. 1950).

In any event, the District Court's denial of summary judgment was not a denial of an injunction for, although the complaint asks for injunctive relief, in the four years since petitioners and other plaintiffs commenced this action no motion for an injunction has been made. Furthermore, petitioners sought no injunction on their summary judgment motion. Indeed, their moving papers recited none of the traditional elements required for the granting of an injunction.

Finally, petitioners' suggestion that "consideration of the summary judgment motion on appeal . . . may result in speedier justice" (Pet. 11) is completely unwarranted. Petitioners are in a substantially identical posture as the other twenty odd plaintiffs remaining in this action. Summary judgment, whether granted or denied, on the one legal theory out of many raised by the motion, would not have avoided the need for a trial. Furthermore, had petitioners diligently pursued their causes of action, a trial could already have been concluded and petitioners would not now be faced with the possibility of an order of dismissal for want of prosecution.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

ANDREW L. HUGHES
Attorney for Respondents

10 February 1971

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Supreme Court of the United States

OCTOBER TERM, 1970

No. 1871

DELLA DAVIS, THEODORE MARKOWITZ, and JACK GULLO,

Petitioners,

—against—

THE NEWS, *et al.*,

Respondents.

REPLY BRIEF FOR PETITIONERS

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Supreme Court of the United States

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REPLY BRIEF FOR PETITIONERS

Though respondents assert (Brief, p. 3) that The News denied that it ever fixed or sought to fix the resale price, it fails to point to any part of the record below containing such a denial. Since the factual allegations as to The News' attempts to fix the resale price[1] were undenied, we have requested the clerk possessed of the record to certify it, and to provide for its transmission to this court.

[1] These will be found at Doc. 23, Markowitz affidavit, p. 7 (see "Independent Home Delivery Agreement" annexed thereto at p. 1 thereof); Davis affidavit, p. 5; Gullo affidavit, pp. 2-3. The News admitted it fixed "a stipulated retail price". Doc. 29, p. 4.

pursuant to Rule 21(1). (We have sent a copy of the request for certification and transmission to the attorney for respondents.)

Petitioners' motion for summary judgment sought the relief requested in the complaint,[2] which included injunctive relief,[3] respondents to the contrary (p. 5) notwithstanding. Nor do respondents explain why granting of summary judgment would not avoid the need for a trial, though respondents concede that petitioners "are in a substantially identical posture" as the other plaintiffs (*ibid.*). Nor do respondents explain their contention that petitioners are now "faced with the possibility of an order of dismissal for want of prosecution" (*ibid*); in fact, the case was placed on the trial calendar on February 11, 1971, the District Court on February 4, 1971 having extended petitioners' time for such action to February 14, 1971, and having denied respondents' request for an order of dismissal.

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

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[2] Doc. 23.

[3] Doc. 1, p. 20.